

IN THE COURT OF APPEALS 03/12/96

OF THE

STATE OF MISSISSIPPI

NO. 93-CA-00547 COA

JERRY ARD

APPELLANT

v.

**ISOLA D. ROYAL, SAMUEL ROYAL, JOSEPH ROYAL, SAMUEL ROYAL, JR.,
YOLANDA ROYAL, CYNTHIA ROYAL, SAMANTHA ROYAL AND VICTORIA ROYAL**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ISADORE W. PATRICK

COURT FROM WHICH APPEALED: CIRCUIT COURT OF CLAIBORNE COUNTY

ATTORNEYS FOR APPELLANT:

JOHN B. MACNEILL

STUART ROBINSON, JR.

ATTORNEY FOR APPELLEES:

WAYNE DOWDY

NATURE OF THE CASE: CIVIL - WRONGFUL DEATH ACTION

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF PLAINTIFFS IN THE
AMOUNT OF \$553,500

BEFORE FRAISER, C.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

Jerry Ard, the Defendant below, appeals from a jury verdict awarding the Plaintiffs below, Isola D. Royal, Samuel Royal, Joseph Royal, Samuel Royal, Jr., Samantha Royal, Yolanda Royal, Victoria Royal and Cynthia Royal, \$553,500 in damages for the wrongful death of the Plaintiffs' decedent, Byron Keith Royal. Finding reversible error as to both the issues of liability and damages, we reverse and remand for a new trial.

I. FACTS

This case involves a wrongful death action brought by the blood relatives of the decedent, Byron Keith Royal.

On March 24, 1991, the decedent and two passengers of his automobile, Alfred Brown and Michael Dunn, were driving south on Highway 569 in Amite County. At approximately 4:00 a.m., the decedent's car was approaching a bridge located near the Louisiana-Mississippi state line. A large logging truck owned by Ard's trucking company, which was being driven by Ard's son Bobby, was proceeding in a northerly direction on the same stretch of highway. A head-on collision between the two vehicles ensued. The decedent and Brown were killed; Dunn suffered injuries but survived.

At trial evidence was presented that may have supported the conclusion that the decedent and his passengers had been drinking alcohol and that the decedent was legally drunk at the time of the collision.

At the time of his death, the decedent was unmarried. However, during the course of the proceedings below, Ard attempted to show that the decedent had fathered two illegitimate children by his girlfriend Kem Williams. These children are a boy and a girl named Byron and Byrikisha Williams.

On October 15, 1991, the parents and siblings of the decedent, including Joseph Royal, the decedent's brother, filed suit in the Circuit Court of Claiborne County. In the complaint, Joseph Royal alleged that he was a resident of Claiborne County, having moved from his family's residence in Louisiana shortly before suit was filed. Because Joseph Royal alleged that Claiborne County was his residence, the Plaintiffs were able to take advantage of that portion of the applicable Mississippi venue statute allowing venue to lie in any county in which a plaintiff resides. Byron and Byrikisha Williams, however, were not named as plaintiffs in the suit.

Ard brought a motion to change venue contending that Joseph Royal's residence was not really Claiborne County and that Joseph Royal was actually still a resident of Norwood, Louisiana, the town in which he had grown up and in which his mother and siblings still lived. This motion was denied by the trial judge. Ard also brought a motion for summary judgment contending that because the decedent had fathered two illegitimate children, the Plaintiffs in this suit were the wrong parties to bring the wrongful death action. This motion was denied and the cause proceeded to trial.

At the close of the evidence, a directed verdict on the issue of punitive damages was granted in favor of the defendant. However, the jury returned a verdict in favor of the Plaintiffs in the amount of

\$553,500. Ard's subsequent motion for JNOV, or a new trial, or remittitur was denied. Ard now appeals, raising nine main assignments of error.

II. DISCUSSION

a) Whether the Trial Court Erred In Not Granting Ard's Motion for Change of Venue?

At the trial level, Ard brought a motion for change of venue asserting that Joseph Royal, the decedent's brother and one of the named Plaintiffs, was not in fact a resident of Claiborne County at the time the suit was filed and that the reason that such residence was alleged was to take advantage of a perceived bias in favor of the Plaintiffs in the Claiborne County courts. After a hearing on the issue, the trial court denied the motion, and the cause proceeded to trial. Ard now asserts that this denial was error.

Section 11-11-5 of the Mississippi Code provides in pertinent part:

Actions against . . . individuals owning, managing, operating or controlling a motor transportation line for the conveyance of . . . freight . . . over the highways in the State of Mississippi, may be brought in the county where the cause of action accrued, in the county where the defendant has its principal place of business or *in the county in which the plaintiff resides*.

Miss. Code Ann. § 11-11-5 (Supp. 1991), *amended by* Miss. Code Ann. § 11-11-5 (Supp. 1995) (emphasis added). By asserting that Joseph Royal was a resident of Claiborne County, the Plaintiffs were able to file their suit there. The hearing on the motion for the change of venue concerned itself with the truth of this assertion. At the conclusion of the hearing, the judge ruled that Joseph Royal met his burden of proving that he had in fact established residence in Claiborne County.

On appellate review, we may overturn a trial judge's findings of fact in relation to a motion for change of venue only if the trial judge was "manifestly wrong." *Buckley v. Guilbert*, 164 So. 2d 743, 744 (Miss. 1964). After reviewing the record, we cannot say that the trial judge's finding that Joseph Royal had established his residence in Claiborne County at the time this suit was filed was manifestly wrong. Accordingly, we reject Ard's contention to the contrary.

b) Does Mississippi's Statutory Scheme Allowing Illegitimate Children to Inherit a Wrongful Death Action From Their Natural Father Unconstitutionally Discriminate Against Illegitimate Children?

Ard asserts that Mississippi's statutory scheme making it possible for illegitimate children to assert a wrongful death action on behalf of their deceased father is unconstitutional under the Fourteenth Amendment of the United States Constitution. Specifically, Ard asserts that this scheme discriminates against illegitimate children and thereby deprives them of the equal protection of the law.

Our State's wrongful death statute, section 11-7-13 of the Mississippi Code, makes it possible for illegitimate children to have all of the same benefits, rights, and remedies conferred on legitimate children, *provided* the illegitimate child "establishes the right to inherit from the deceased under Section 91-1-15." Miss. Code Ann. § 11-7-13 (Supp. 1995). In turn, section 91-1-15(3) of the

Mississippi Code provides in pertinent part that:

An illegitimate shall inherit from and through the illegitimate's natural father and his kindred [who died intestate] . . . according to the statutes of descent and distribution if:

- (a) The natural parents participated in a marriage ceremony before the birth of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or
- (b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or
- (c) There has been an adjudication of paternity after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under sections 91-1-27 and 91-1-29. However, no such claim of inheritance shall be recognized unless the action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less; and such time period shall run notwithstanding the minority of the child. No claim of inheritance based on an adjudication of paternity, after death of the intestate, by a court outside the State of Mississippi shall be recognized unless:
 - (i) Such court was in the state of residence of the intestate at the time of the intestate's death;
 - (ii) The action adjudicating paternity was filed within (90) days after the death of the intestate;
 - (iii) All known heirs were made parties to the action; and
 - (iv) Paternity or legitimacy was established by clear and convincing evidence.

Miss. Code Ann. § 91-1-15(3) (1972).

Ard claims that at the time that the decedent died he was the father of two illegitimate children, Byron and Byrikisha Williams. These two children lived in Louisiana with their mother, Kem Williams, who was allegedly the decedent's alleged longtime girlfriend.

Assuming for the sake of argument that Byron and Byrikisha Williams actually were the decedent's illegitimate children, under our wrongful death statute they would not be entitled to assert a wrongful death action as a result of their father's death unless they had complied with one of the pertinent subsections of section 91-1-15(3). Ard does not claim that either the decedent and Kem Williams engaged in a wedding ceremony or that an adjudication of paternity occurred before the decedent's death. Accordingly, the only way that these children could bring the present wrongful death action would be for them to comply with the applicable requirements of subparagraph (3)(c). Ard argues that this scheme unconstitutionally discriminates between illegitimate and legitimate children since it effectively allows a decedent's illegitimate children only ninety days after his death to bring a wrongful death action while legitimate children would, pursuant to the statute of limitations in section 15-1-49 of the Mississippi Code, have three years to bring a wrongful death action.

We observe first that Ard's argument presents us with somewhat convoluted reasoning. Pursuant to our statutory scheme, an illegitimate child, *once paternity has been established in conformity with*

the requirements of section 91-1-15, would have the same amount of time to bring a wrongful death action as a legitimate child. Thus, Ard's claim that the scheme deprives illegitimates of the equal protection of the law because it gives them a shorter amount of time to bring a wrongful death action is inaccurate. What Ard is really attacking, is the fact that, pursuant to section 91-1-15, illegitimates are not given *an unlimited period of time after the death of the father* to establish paternity such that they can be put into a position to assert a wrongful death claim. Ard specifically argues that in the case of the decedent's younger daughter, Byrikisha Williams, a child who was not born until three months after the decedent's death, the time periods for establishing paternity provided by section 91-1-15(3)(c) unconstitutionally limit her right to establish paternity such that she can assert a wrongful death action.

We think that it would be inappropriate to address this argument for there is a threshold requirement that Ard has failed to surmount. He has failed to convince us that he possesses standing to assert the rights of Williams' children in a constitutional challenge.

In *Mississippi High School Activities v. Farris*, 501 So. 2d 393, 398 (Miss. 1987), the Mississippi Supreme Court adopted the constitutional standing principles articulated by the United States Supreme Court in its abortion rights decision, *Singleton v. Wulff*, 428 U.S. 106 (1976). According to the Mississippi Supreme Court:

In *Singleton*, the [United States] Supreme Court implemented standards by which to determine if the [physician-]plaintiffs were proper proponents of the constitutional rights of their patients. The Court looked primarily to two factual elements: (1) The relationship of the litigants to the person whose rights were asserted; (2) the ability of the third parties to assert their own rights.

Farris, 501 So. 2d at 398.

With respect to the first element, the *Singleton* decision suggested that the relationship of the party before the court to the party not before the court must be such that the party before the court "is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton*, 428 U.S. at 115. Here, we do not see how Ard, a party whose interest as a civil defendant would be just as adverse to the interests of Williams' children as that interest presently is adverse to the interests of the current Plaintiffs, is fully or very nearly as effective an advocate of Williams' children's constitutional rights as they or their mother are.

With respect to the second element, *Singleton* suggested that ability of third parties to assert their own rights must be impeded by "some genuine obstacle to such assertion." *Singleton*, 428 U.S. at 116. We cannot readily comprehend what obstacles stand in the way of Williams' children or their legal representatives bringing the present constitutional challenge to the Mississippi statutory scheme. We, therefore, hold that Ard is the wrong party to be asserting the equal protection challenge before our Court and therefore decline to address it.

c) Unconstitutionality Aside, the Williams Children Did Comply With the Requirements of Section 91-1-15 Such That They Were the Proper Parties to Bring the Present Wrongful Death Action.

Ard brings to our attention that fact that after decedent died, Kem Williams, within ninety days after decedent's death, filed an administrative action with the Social Security Administration ("SSA") in Louisiana, the state of the decedent's residence at death. This action apparently sought an adjudication of paternity and recovery of support benefits for her two illegitimate children. The SSA apparently adjudicated the issue and found the paternity of the decedent with respect to Byron Williams established. Ard argues therefore that this SSA proceeding qualified as "an adjudication of paternity, after the death of the intestate, by a court outside the State of Mississippi" pursuant to section 91-1-15(3)(c) that this adjudication therefore allowed the children to bring the wrongful death action. We disagree.

One of the requirements that must be met pertaining to the validity of paternity determinations occurring outside of Mississippi for the purposes of section 91-1-15(3)(c) is that all known heirs be made parties to the action in which paternity is determined. Miss. Code. Ann. § 91-1-15(3)(c)(iii) (1972). It is undisputed that at the time the decedent died, he was survived by both a natural father and a natural mother who are also named plaintiffs in this suit. Ard has failed to point to anything on the record demonstrating that these parents were made parties to the SSA proceeding. Accordingly, even were we to hold that the SSA proceeding in which Byron Williams was determined to be the son of the decedent was an adjudication of paternity "by a court outside the State of Mississippi," we would still not be able to recognize that SSA paternity determination as valid under the provisions of section 91-1-15(3)(c)(iii) because the decedent's parents were not joined. Accordingly, any contention that the SSA proceeding established Byron Williams as the rightful person to bring the present wrongful death action is without merit and must fail.

d) The Verdict of the Jury and the Judgment of the Court Were Against the Overwhelming Weight of the Evidence

Ard asserts that the jury's verdict was against the overwhelming weight of the evidence. The Mississippi Supreme Court has set forth the scope of review when the jury's verdict is challenged in such a manner:

We consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand, if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith, 523 So. 2d 324, 326 (Miss. 1988). We are of the opinion that fair minded jurors in this case could have reached different conclusions. Accordingly, we find this contention without merit.

e) Was the Jury's Damage Award Erroneous in View of the Plaintiffs' Failure to Produce Evidence As to the Life Expectancy of the Wrongful Death Beneficiaries?

Ard contends that the trial court erred in allowing the Plaintiffs to recover damages for the loss of society and companionship of the decedent in view of the fact that the Plaintiffs failed to offer any proof as to the life expectancy of those Plaintiffs who were older than the decedent. With respect to this issue, the Mississippi Supreme Court has stated:

The rule now in force in Mississippi is that the measure of recovery [in a wrongful death action] is limited to the period of the life expectancy of the beneficiary, if it be shorter than that of the person killed, or to that of the deceased, if it be shorter than that of the beneficiary. . . .

For the failure to prove the life expectancy of the wife as to age, health, etc., from which the jury could find the expectancy, we must reverse the case as to damages, and remand it for a new trial as to damages.

Goodyear Yellow Pine Co. v. Anderson, 171 Miss. 530, 536-37 (1935); *see also Mississippi Oil Co. v. Smith*, 95 Miss. 528, 534-35 (1909) (in a wrongful death action, as between the decedent and the surviving beneficiary, it is the life expectancy of the one who will die soonest that will control the amount of damages to be awarded and it was manifest error to allow the mother of the decedent to recover for her son's death where no proof as to her age, health and constitution was offered).

The Plaintiffs do not dispute that they failed to offer evidence as to the life expectancy of those beneficiaries who were older than the decedent. Instead, they contend that their failure to offer such proof was not a problem since a number of them were actually younger than the decedent. We find the Plaintiffs' position without merit. In *Smith*, the Mississippi Supreme Court was willing to find reversible error when evidence as to the surviving mother's life expectancy was not offered even though the other wrongful death beneficiaries and named plaintiffs to whom the jury awarded damages were the four presumably younger siblings of the decedent. *Id.* at 535. The record before us discloses that four of the Plaintiffs, including the decedent's mother and father and two of his siblings, were older than the decedent while four of the Plaintiffs were younger than he. Accordingly, we think that the jury's verdict should be reversed and remanded insofar as the award of damages is concerned.

f) Did the Trial Court Err In Failing to Instruct the Jury That It Could Only Award Damages For the Present Net Cash Value of the Decedent's Life?

Ard contends that the trial court erred because it failed to instruct the jury that in awarding damages for the decedent's life expectancy, it should award an amount that reflected the *present* net cash value of this life expectancy instead of only the net cash value. It is true that in a wrongful death action, a jury may only award the present net cash value of the life expectancy of the deceased, *McGowan v. Estate of Wright*, 524 So. 2d 308, 311 (Miss. 1988). The trial court gave jury instruction D-21, which read, with an emphasis:

The Court instructs the jury that in calculating the *present* net cash value of the decedent's life in this case, if any, you must deduct from the decedent's probable gross annual income the amount which he would have spent on his own expenses

However, we note that there was no instruction in the record as to what is meant by the term "present net cash value." In addition, the Plaintiffs do not dispute Ard's contention that there was no evidence offered, expert or otherwise, as to the proper method to be used in discounting an award to present value. Thus, we hold that the trial court erred in allowing the jury to consider and award damages for the decedent's life expectancy and such error also requires that a new trial be had on the issue of damages.

g) Did the Trial Court Err in Not Granting An Instruction to the Jury Directing That It Could Not Award Punitive Damages?

Ard contends that the trial judge erred in failing to instruct the jury that it could not consider or award punitive damages. In response, the Plaintiffs contend that such instruction was unnecessary in view of the fact that the trial judge granted Ard a directed verdict on this issue.

"[A]n instruction denying punitive damages should always be given where presented and where there is not evidence to sustain a verdict for exemplary or punitive damages." *Boyd Constr. Co. v. Bilbro*, 210 So. 2d 637, 640 (Miss. 1968). While fully cognizant of the fact that the judge directed a verdict in favor of Ard on this issue, we are also aware that the Plaintiffs' complaint prayed for punitive damages as part the Plaintiffs' requested relief. We thus have no way of knowing whether the \$550,000 verdict in favor of the Plaintiffs was the result of the jury's having included punitive damages in its award. We think that even though Ard obtained a directed verdict in his favor on this issue, at the very least, as a matter of prudence, Ard was entitled to have the trial judge at some point instruct the jury that the issue of punitive damages was no longer a contested issue in the case. The Plaintiffs point to nothing in the record showing us that the judge told the jury any such thing. Thus, we cannot conclude that a specific jury instruction denying such damages would have been superfluous. *See, e.g., Bilbro*, 210 So. 2d at 640 (the trial judge did not err when he declined to instruct the jury that it could not award punitive damages when such damages were not an issue in the case). Under these circumstances, we think that the prudent path would have been for the trial court to instruct the jury that it could not award punitive damages. We therefore hold that on remand, Ard will be entitled to such an instruction.

f) Did The Trial Court Err in Refusing to Grant Ard's Jury Instruction D-22 Concerning the Consumption of Alcohol By Decedent?

The trial court refused Ard's jury instruction labeled as D-22. This instruction reads:

The Court instructs the jury that as a matter of law, the consumption of even a small quantity of alcohol may significantly impair the reaction time of an operator of a motor vehicle. The Court further instructs the jury that it is negligence as a matter of law to

operate a motor vehicle while intoxicated. The Court further instructs the jury that driving an automobile on the highway under the influence of intoxicating beverages is not only dangerous, it is negligence *per se*.

The Court therefore instructs the jury that if you find from the evidence in this case that at the time and place of the accident, Plaintiffs' decedent, Byron Keith Royal, was operating the motor vehicle under the influence of intoxicating beverages, or was operating the motor vehicle while intoxicated, then Plaintiffs' decedent was negligent. If you find that such negligence was the sole proximate cause of the accident in question, it is your sworn duty as jurors to return a verdict for Jerry Ard.

Ard argues that in view of the evidence on the record showing that the decedent was legally intoxicated at the time of the collision with Ard's truck and that the decedent was the sole proximate cause of the accident as a result of his crossing over into Ard's lane, that this instruction should have been given. We agree.

It is obvious that driving a motor vehicle while intoxicated in Mississippi constitutes negligence *per se* based upon violation of statute. Thus, insofar as D-22 instructed the jury that it could have found that the decedent was legally intoxicated at the time of the collision, that this intoxication comprised negligence on the part of the decedent and that this intoxication was the sole cause of the collision, D-22 was a correct statement of the law. Furthermore, there was evidence on the record that would have supported each of these findings. Accordingly, Ard was entitled to have this instruction given. In making this statement, however, we also note that the first sentence of D-22 was superfluous and potentially prejudicial. Accordingly, we hold that the failure to let Ard submit a negligence *per se* instruction directing the jury that it could find that the decedent's intoxication was the sole proximate cause of the collision was reversible error. We remand for a new trial on the issue of liability.

III. CONCLUSION

In view of the preceding discussion, we reverse and remand this case to the Circuit Court of Claiborne County for a new trial on the issues of both liability and damages.

THE JUDGMENT OF THE CIRCUIT COURT OF CLAIBORNE COUNTY IS REVERSED AND THIS CAUSE IS REMANDED FOR NEW TRIAL. COSTS ARE ASSESSED TO THE APPELLEES.

FRAISER, C.J., AND BRIDGES, P.J., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.